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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ERNEST WHITE, Defendant and Appellant.	E049522 (Super.Ct.No. RIF144205) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Modified and affirmed with directions.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and Charles C Radland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Robert Ernest White (hereafter defendant) guilty as charged of two counts of second degree burglary (Pen. Code, §§ 459, 460) (counts 1 & 2), one count of grand theft (Pen. Code, § 487, subd. (a)) (count 3), and one count of resisting an executive officer by use of force or violence (Pen. Code, § 69) (count 4). After he waived his right to a jury, the trial court found true the allegations that defendant had served three prior terms in prison within the meaning of Penal Code section 667.5, subdivision (b) and had previously been convicted of a serious or violent felony within the meaning of Penal Code section 667, subdivisions (c) and (e)(1), the so-called three strikes law.[1] The trial court sentenced defendant to serve a term of 10 years four months in prison.

Defendant asserts seven claims of error in this appeal, the details of which we recount below in our discussion of those claims. We agree with defendant's claim that under section 654 the trial court should have stayed execution of his sentence on one of the two burglary convictions. Therefore, we will modify defendant's sentence, accordingly. Otherwise we will affirm.

FACTS

On June 21, 2008, defendant entered a Home Depot store in Corona. Defendant's actions were recorded by security video cameras. The videotape shows defendant as he entered the store, and then shows him carrying items of merchandise as he walks back

[1] All further statutory references are to the Penal Code unless indicated otherwise.

toward the store entrance. Defendant lifts the items of merchandise over the theft prevention sensors and places them on the floor next to the merchandise return counter. Defendant then leaves the store after telling a store employee he will return. The security cameras also videotaped defendant's two accomplices as they enter the store, pick up the merchandise defendant left on the floor at the return counter, and try to return that merchandise. The Home Depot employee denied the refund because the amount of money involved was significant, and the employee was suspicious as a result of defendant's earlier actions. The accomplices then left the store with the merchandise.

Defendant and the two accomplices then went to another Home Depot store where they each returned some of the merchandise in three separate transactions and received store credits in the form of gift cards. Defendant took his gift card to a third Home Depot but could not use it because the gift card had been voided by a Home Depot asset protection specialist who had reviewed the videotapes shortly after the transactions occurred. Defendant was told by a store employee to take the gift card back to the store that had issued it.

When defendant returned to the Home Depot where he had obtained the gift card, a store employee pointed defendant out to a police officer. The officer followed defendant out of the store and asked to speak to him. Defendant turned, took a step toward the officer, and began yelling. The officer "grabbed his arm to detain him." Defendant pulled away from the officer and then came back toward her "with his fist clenched . . . as if he [were] going to strike [her]." After she lost her grip on him, the

officer "stepped away" from defendant, who "turned to begin to run." The officer grabbed at the shoulder of defendant's tank top, but defendant got away and ran toward a nearby freeway. Defendant crossed the freeway and hid in a tile factory where police officers ultimately apprehended him at the culmination of a 13-officer-two-K9-unit search.

Additional facts will be recounted below as pertinent to the issues defendant raises on appeal.

DISCUSSION

Defendant raises two claims in which he purports to challenge the sufficiency of the evidence to support two of the jury's guilty verdicts. We first address those claims.

1.

SUFFICIENCY OF THE EVIDENCE ISSUES

A. Burglary Conviction on Count 2

Defendant contends the evidence is insufficient to support his conviction on count 2, which charges defendant with burglary based on his act of entering the second Home Depot store[2] with the merchandise stolen from the first Home Depot store.[3] According to defendant, he did not have the intent to commit a theft when he entered the second Home Depot store because the act of taking the merchandise and returning it for a refund

[2] The Attorney General refers to this Home Depot as the North Corona store, and defendant refers to this Home Depot as the McKinley Avenue store.

[3] The Attorney General refers to this Home Depot as the South Corona store, and defendant refers to this Home Depot as the Ontario Avenue store.

constituted only one act of theft and that act was complete when defendant and his cohorts took possession of merchandise in the first Home Depot store with the intent to return it for a refund.

Defendant bases his argument in part on *People v. Davis* (1998) 19 Cal.4th 301, in which the Supreme Court addressed the question of what crime is committed under the circumstances at issue in this case, i.e., when the defendant enters a store, takes an item of merchandise with intent to claim ownership of the merchandise, and then presents that item of merchandise for a refund. The court held that the crime is theft by trespassory larceny. (*Id*. at p. 303.) *People v. Davis* does not hold, as defendant asserts, that the crime is complete when the defendant takes possession of the merchandise. But even if it did, that holding would not resolve the issue presented here, which is whether defendant harbored the intent to commit theft, and therefore committed a burglary, when he entered the second Home Depot store with the merchandise taken from the first Home Depot store. In order to find defendant guilty of burglary, the evidence had to show that at the time he entered the second Home Depot store, defendant intended to commit a theft. (§ 459.) It is the defendant's intent at the time he entered the store that governs whether he committed a burglary. Whether defendant actually commits the intended crime, or whether it is even factually possible[4] to do so, is irrelevant.

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[4] Factual impossibility occurs when the objective of the defendant's conduct is proscribed by the criminal law, but a circumstance unknown to the actor prevents him or her from bringing about that objective. (*People v. Peppars* (1983) 140 Cal.App.3d 677, 687, fn. 5.)

The evidence in this case is undisputed: Defendant entered the second Home Depot store with the intent to obtain a refund for the merchandise he and his coparticipants took from the first Home Depot store. That evidence supports the jury's verdict finding defendant guilty of burglary based on his entry, with the intent to commit theft by larceny, into the second Home Depot store. By presenting the merchandise for a refund, defendant completed the theft that began at the first Home Depot store.

B. Conviction for Resisting Officer by Use of Force or Violence

Defendant contends the evidence is insufficient to support the jury's verdict finding him guilty on count 4 of violating section 69 by resisting an executive officer by the use of force or violence because there was no evidence of force or violence. We disagree.

Defendant was charged in count 4 with violating section 69, which makes it a crime punishable as either a felony or a misdemeanor for "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty . . . ." "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.)

At trial, the prosecutor argued that defendant violated section 69 in the second way set out above, i.e., by resisting with force or violence. The trial court in turn instructed the jury according to CALCRIM No. 2652 that, "The defendant is charged in Count 4 with resisting an executive officer in the performance of that officer's duty in violation of Penal Code Section 69. To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant unlawfully used force or violence to resist an executive officer[; Two,] [w]hen the defendant acted, the officer was performing her lawful duty[;] and [Three,] when the defendant acted he knew the executive officer was performing her duty." During deliberations, the jury asked whether the term "force" has a "special definition." In discussing the jury's inquiry with counsel, the trial court stated that he looked for but could not find a definition of force in the CALCRIM jury instructions or the pertinent use notes. As a result, the trial court referred to the CALJIC jury instructions, and ultimately found CALJIC No. 16.141, which defines the terms "force" and "violence" in the context of the crime of battery. The trial court proposed to respond to the jury's questions with "a portion of the first paragraph of the 16.141 definition . . . as follows: The words force and violence are synonymous and mean any unlawful application of physical force against the other, even though it causes no pain or bodily harm or leaves no mark." Because neither attorney objected, the trial court sent the following response to the jury: "The words 'force' and 'violence' are synonymous and mean any unlawful application of physical force against the person of another even though it causes no pain or bodily harm or leaves no mark."

As defendant correctly points out, the terms "force" and "violence" as used in section 69 are not defined either in the statute or by case law. Defendant contends the trial court's definition is correct. We disagree. The definition the trial court used is taken from the crime of battery, which is defined in section 242 as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) As previously quoted, a violation of section 69 does not require the use of force or violence *upon the person* of an executive officer. In other words, section 69 is violated by force or violence that does not amount to a battery. Therefore, the trial court's definition was incorrect.

According to well-established principles of statutory construction, "words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) The phrase "force or violence" does not have a technical meaning and is not used in section 69 in any technical or unusual sense. Consequently, the trial court should have responded to the jury's question, "No, the word force does not have any special definition."

The evidence in this case is sufficient to show defendant used force or violence in resisting the officer. According to the officer, as previously recounted, defendant pulled away in order to break free from her grasp and then he swung his clenched fist at her. That evidence is sufficient to show defendant resisted the officer with force or violence and in doing so violated section 69.

2.

JURY INSTRUCTION ISSUES

Defendant raises three claims of instructional error. We first address his contention that the trial court committed reversible error because it did not instruct the jury on the correct felony underlying the burglary charge alleged in count 2.

A. Count 2 Target Felony

As previously noted, defendant was charged with two counts of burglary based on the events that occurred at each of the Home Depot stores. The trial court instructed the jury that in order to find defendant guilty of those charges "the People must prove that, one, the defendant entered a building, and two, when he entered a building he intended to commit theft." The trial court then instructed the jury on the elements of the crimes of grand and petty theft, i.e., theft by larceny, as the underlying theft offenses. Defendant contends that the target crime he intended to commit at the second Home Depot was theft by false pretenses, and therefore the trial court committed reversible error in failing to instruct the jury on that target offense.

According to *People v. Davis*, *supra*, if defendant had taken possession of the merchandise and presented it for a refund without removing the merchandise from the first Home Depot store, the crime committed would have been theft by larceny. (*People v. Davis*, *supra*, 19 Cal.4th at pp. 317-318.) Defendant was thwarted in his effort to obtain a refund at the first Home Depot store, so he took the merchandise to the second Home Depot store in order to try again. The target crime at each store is the same, theft

by larceny. Therefore, we conclude the trial court correctly instructed the jury in this case on that target offense.

B. Unanimity Instruction

Defendant contends a unanimity instruction was required because the prosecution charged defendant in count 3 of the information with theft of money and personal property of a value exceeding $400, and the prosecutor argued in closing that defendant was guilty of stealing merchandise, in particular faucets, and also a store credit voucher. According to defendant the prosecutor was required to elect which items, taken from which store, constituted the crime of theft charged in count 3 and because he did not, a unanimity instruction was required.

Defendant's characterization of the record is wrong. Although the theft charge set out in the amended information includes the alternative language regarding theft of money and personal property, the allegation specifies that the theft consisted of "MERCHANDISE, the property of HOME DEPOT." Moreover, the prosecutor argued in closing that the theft charged in count 3 was based on four boxes of faucets taken from the first Home Depot store that defendant then tried to return for a refund at the second Home Depot store. In the course of discussing the elements of the crime of theft by larceny, the prosecutor did incorrectly state that defendant took something from each Home Depot store—merchandise from the first store and money in the form of a cash or gift card from the second store—"[s]o each time he went and committed a theft."

Although defendant intended to commit theft when he entered each Home Depot store, the crime of theft by larceny was one continuous act that started at the first Home Depot store and ended at the second Home Depot store. Because the evidence did not show more than one act of theft, no unanimity instruction was required.

C. Lesser Included Offense Instruction

Defendant contends that resisting arrest in violation of section 148, subdivision (a) is a lesser included offense of the crime of resisting an executive officer by force or violence in violation of section 69 alleged in count 4, and therefore the trial court should have instructed the jury on that lesser included crime. *People v. Lacefield* (2007) 157 Cal.App.4th 249 holds that section 148, subdivision (a)[5] is a lesser included offense of the second type of violation set out in section 69. (*Lacefield*, at p. 259, disagreeing with *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532, which holds otherwise but does not distinguish between the two types of violations set out in § 69.) We agree with *People v. Lacefield*, but conclude that failure to instruct on the lesser included offense was not error, for reasons we now explain.

"'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' [Citation.] 'Under California law, a lesser offense is necessarily

[5] Section 148, subdivision (a)(1) provides in pertinent part, "[e]very person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty" has committed a crime punishable as a misdemeanor.

included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.]" (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984.)

In this case, as in *People v. Carrasco*, "if [defendant] resisted the officers at all, he did so forcefully, thereby ensuring no reasonable jury could have concluded he violated section 148, subdivision (a)(1) but not section 69." (*People v. Carrasco, supra,* 163 Cal.App.4th at p. 985.) Defendant does not dispute the evidence on this point. Instead he relies on the trial court's definition of "force or violence" to argue that because the officer testified that defendant did not strike her, he also did not resist with force. We have concluded, as previously discussed, that the trial court's definition of "force or violence" is incorrect. The evidence is undisputed that defendant resisted the officer with force when he pulled away in order to break free from the officer's grasp and then swung his clenched fist at her. Because the jury could not have found based on the noted evidence that defendant resisted the officer other than by force, the trial court properly instructed the jury only on the section 69 violation.

3.

SENTENCING ISSUES

At sentencing the trial court stayed execution of the sentence imposed on count 3, defendant's grand theft conviction. Defendant contends the trial court also should have stayed the sentence imposed on one of the two burglary convictions and that failure to do

so violates Penal Code section 654. Defendant also contends that the trial court improperly imposed an assessment under Government Code section 70373 because that statute was enacted after defendant committed his crime. We agree with his first claim, but not the second, for reasons we now explain.

A. Section 654 Issue

Section 654, subdivision (a) states in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits multiple punishments for multiple offenses that arise from a single act or indivisible course of criminal conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 18.) When the defendant commits more than one physical act during a criminal enterprise the question is whether the course of criminal conduct is divisible and "therefore gives rise to more than one act within the meaning of section 654." (*Id.* at p. 19.) Resolution of that question, in turn, "depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*)

The trial court sentenced defendant on count 1, which charged defendant with burglary of the first Home Depot store, to the upper term of three years, which the trial court doubled to six years in accordance with the mandate of the three strikes law. The

trial court also sentenced defendant on count 2, defendant's conviction for burglary of the second Home Depot store, to the middle term of two years, to be served concurrently with the six-year term imposed on count 1. On count 3, defendant's conviction for grand theft in violation of section 487, the trial court imposed a middle term sentence of two years that the trial court then stayed in accordance with section 654.

We agree with defendant that both burglaries were committed with the same intent—to take merchandise and then return that merchandise for a refund and thereby commit theft. According to the evidence, defendant and his cohorts took merchandise from the first Home Depot store but were unable to obtain a refund for the merchandise at that store. As a result, they took the merchandise to a second Home Depot store where they were able to return it for store gift cards. Under these circumstances both burglaries were committed with the same intent, to commit theft by returning the stolen merchandise for a refund. Therefore, the trial court should have stayed execution of the sentence imposed not only on count 3 but also on count 2, defendant's conviction for burglary of the second Home Depot store.

B. Court Facilities Assessment Issue

Defendant contends the trial court improperly imposed a $120 court facilities assessment because Government Code section 70373, which authorizes that assessment, was not enacted until January 2009, and defendant committed his crime in 2008.

Government Code section 70373, provides in part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction

for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." (Gov. Code, § 70373, subd. (a)(1); Stats. 2008, ch. 311, § 6.5.)

Defendant contends as a matter of statutory construction Government Code section 70373 is presumed to operate prospectively. Our colleagues in the Third District recently addressed and rejected this precise assertion in *People v. Castillo* (2010) 182 Cal.App.4th 1410 (*Castillo*). We can do no better here than to liberally quote from that opinion.

As the *Castillo* court noted, "as a matter of statutory construction, the assessment does not apply to crimes committed before its effective date. [Defendant] relies on the general interpretive rule that statutes are presumed to operate prospectively. [Citation.] But we must first ask, on what event does this statute operate?" (*Castillo, supra,* 182 Cal.App.4th at p. 1413.) "The assessment is 'imposed on every conviction' as defined. [Citation.] Defendant's . . . *conviction* occurred after the statute's effective date. The fact that defendant's conviction flowed from antecedent criminal conduct is not addressed by the statute." (*Id.* at p. 1414.)

"The California Supreme Court reached a similar conclusion regarding an analogous statute. In *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*), a statute effective

after Alford's crime imposed a court security fee on every conviction. (See Pen. Code § 1465.8.) Because the statute was part of a budgeting bill, the court concluded that 'the Legislature intended to impose the court security fee to all convictions after its operative date.' [Citation.]" (*Castillo*, *supra*, 182 Cal.App.4th at p. 1414, citing *Alford*, at p. 754.) "The court security fee statute provides in part: 'To ensure and maintain adequate funding for court security, a fee of thirty dollars ($30) shall be imposed on every conviction for a criminal offense [as defined].' (Pen. Code, § 1468.5, subd. (a)(1).) The criminal conviction assessment statute at issue here provides in part: 'To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense [as defined].' ([Gov. Code,] § 70373, subd. (a)(1).)" (*Castillo*, at p. 1414.)

"The similarity between these two provisions is stark. The conclusion that the Legislature decided to convey the same meaning in both statutes seems inescapable. *Alford* was decided before [Government Code] section 70373 was enacted. Generally, 'when a term has been given a particular meaning by a judicial decision, it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions.' [Citations.]" (*Castillo*, *supra*, 182 Cal.App.4th at p. 1414.) "The Legislature's decision to word [Government Code] section 70373 like the court security fee statute, *after* the latter statute had been interpreted by *Alford* to apply to convictions occurring after that statute's effective date, shows that the Legislature intended the new assessment to apply to convictions occurring after the new statute's effective date." (*Ibid.*) "Further, like the

court security fee, the criminal conviction assessment for court facilities was enacted as part of the budgeting process. [Citation.] In *Alford*, the California Supreme Court viewed such circumstance as an indication that the court security fee was meant to apply to convictions incurred after its operative date. [Citations.] The same rationale obtains here." (*Ibid*.)

We conclude here as the court did in *Castillo*, that the assessment applies to convictions that occur after the operative date of the statute. Therefore, the trial court properly imposed the $120 criminal conviction assessment.

DISPOSITION

The judgment is modified to stay under section 654 the sentence imposed on count 2. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment that correctly reflects defendant's sentence as modified, and to forward copies of the amended abstract to the appropriate entities and agencies.

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/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ King
J.